

(3) The employer shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with prohibited drug use does not refer the employee to the substance abuse professional's private practice from which the substance abuse professional receives remuneration or to a person or organization from which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(i) A public agency, such as a State, county, or municipality;

(ii) The employer or a person under contract to provide treatment for prohibited drug use problems on behalf of the employer;

(iii) The sole source of therapeutically appropriate treatment under the employee's health insurance program; or

(iv) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

(c) An employer shall ensure that, before returning to duty to perform a safety-sensitive function, a covered employee has complied with the referral and evaluation provisions of this part and takes a return to duty drug test with a verified negative result under § 653.49.

(d) The requirements of this section do not apply to applicants.

[59 FR 7589, Feb. 15, 1994, as amended at 60 FR 12297, Mar. 6, 1995]

### Subpart C—Types of Drug Testing

#### § 653.41 Pre-employment testing.

(a) An employer may not hire an applicant to perform a safety-sensitive function unless the applicant takes a drug test with a verified negative result administered under this part.

(b) An employer may not transfer an employee from a nonsafety-sensitive function to a safety-sensitive function until the employee takes a drug test with a verified negative result administered under this part.

(c) If an applicant or employee drug test is canceled, the employer shall require the employee or applicant to

take another pre-employment drug test.

#### § 653.43 Reasonable suspicion testing.

(a) An employer shall conduct a drug test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug.

(b) An employer's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee. The required observations must be made by a supervisor who is trained in detecting the signs and symptoms of drug use.

[59 FR 7589, Feb. 15, 1994, as amended at 60 FR 12297, Mar. 6, 1995]

#### § 653.45 Post-accident testing.

(a)(1) *Fatal accidents.* As soon as practicable following an accident involving the loss of human life, an employer shall test each surviving covered employee operating the mass transit vehicle at the time of the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(2) *Nonfatal accidents.* (i) As soon as practicable following an accident not involving the loss of human life, in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, the employer shall test each covered employee operating the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(ii) As soon as practicable following an accident not involving the loss of human life, in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the employer

shall test each covered employee operating the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The decision not to administer a test under this paragraph shall be based on the employer's determination, using the best available information at the time of the determination, that the employee's performance could not have contributed to the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(b) An employer shall ensure that a covered employee required to be tested under this section is tested as soon as practicable and within 32 hours of the accident. A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

(c) Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

[59 FR 7589, Feb. 15, 1994, as amended at 60 FR 12297, Mar. 6, 1995; 60 FR 39620, Aug. 2, 1995]

**§ 653.47 Random testing.**

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All in-

formation used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 653.73 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent. However, after the initial two years of random testing by large transit operators and the initial first year of testing by small transit operators, the Administrator may lower the rate the following calendar year, if the combined positive testing rate is less than 1.0 percent, and if it would be in the interest of safety.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 653.73 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(e) The selection of employees for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall